FEB 14 1968 SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION,

Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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INDEX

PAGE

Motion for Leave to File Brief as *Amicus Curiae* .. 1

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC., AMICUS CURIAE:

Interest of the Authors League of America, Inc. 3

POINT I—CATV's use of copyrighted motion pictures is copyright infringement 4

POINT II—A copyright owner should not be deprived of valuable rights in his work by an involuntary license, created by "implication" .. 6

CONCLUSION 11

CASES CITED

Herbert v. Shanley Co., 242 U.S. 591, 594 ..... 5, 7

Mazer v. Stein, 347 U.S. 201, 219 (1954) 4

AUTHORITIES CITED

Business Week, February 19, 1966, p. 104 8

The Wall Street Journal, Jan. 15, 1967 8

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Authors League of America, a national society of writers and dramatists, respectfully petitions for leave to file the annexed brief *amicus curiae* in this proceeding.

Counsel for the Applicant is familiar with the questions involved in this case, and the scope of their presentation, and believes that there is necessity for additional argument on the points specified in the annexed brief. Of particular concern to authors is the contention of the Solicitor General that an author should be deprived of valuable rights in his work by imposition of a "license," to be created by implication.

Counsel for the Authors League has been advised by Respondent's attorneys that they consent to the filing of the within brief *amicus curiae.* Counsel for Petitioner advised the League's attorney that while they do not consent to the filing of this brief, they do not intend to file objections to the League's motion for leave to file it.

Because the Authors League believes the fundamental questions under the United States Copyright Act, presented here, are of tremendous importance to American authors, it respectfully requests permission to file the within brief *amicus curiae.*

Respectfully submitted,

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UNITED ARTISTS TELEVISION, INC.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC., *AMICUS CURIAE*

Interest of the Authors League of America, Inc.

The members of the Authors League of America are professional authors whose books and plays are frequently adapted into motion pictures (which are subsequently shown on television) or television programs. Their income depends on the proceeds received by motion picture and television producers of their work. Often, the author's compensation includes a share of these proceeds.

POINT I

CATV's use of copyrighted motion pictures is copyright infringement.

The opinions of the District Court and Court of Appeals and the Solicitor General's brief, make it clear that a CATV system's retransmission of a copyrighted work to its audience of subscribers—using a television broadcast as the source of its performance—is copyright infringement.

Sections 1(c) and 1(d) of the Copyright Act gives the copyright owner of a motion picture or a television program the exclusive right "to exhibit, perform, represent, produce or reproduce it in any manner or by any means whatsoever." CATV's use of copyrighted works obviously comes within the language of the section, whatever the reader's choice of the appropriate operative verbs. Indeed, more important than the semantic decision as to whether CATV's use is a performance, exhibition, or reproduction, is the fact that it employs the copyright owner's work without his permission, charging an audience for the privilege of seeing it. It reaps the very benefit which the Act was intended to secure to the author—the opportunity to derive personal gain from his work. Cf. *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954).

If a CATV system took copyrighted motion pictures off the air, carried them by cable into a theatre, showed them on a screen (simultaneously with the originating broadcast) and charged a monthly admission fee, entitling the subscriber to attend all performances (at that theatre, and others which carried the programs broadcast by other stations)—certainly the system would be guilty of copy-

right infringement. The present CATV operation is no different in its purposes or effect—it simply carries the motion pictures to its audience, instead of requiring them to come to the theatre. Its purpose is the same—to collect an admission charge. And, as Justice Holmes long ago noted, it makes no difference whether "money is taken in at the door" or earned—through use of the copyrighted work—by other means. *Herbert* v. *Shanley Co.*, 242 U.S. 591, 594.

The fact that CATV's use of copyrighted works employs the performance embodied in the originating broadcast as the source of its performance does not excuse the infringement. An unauthorized radio broadcast of a musical composition is an infringement, even though the station performed the composition by playing a record—embodying the live performance of the orchestra—which had been manufactured and sold with the copyright owner's consent; or even though the station performed the composition by picking up, and rebroadcasting to its audience, a broadcast made by another station which had been licensed to perform the work. An unauthorized television broadcast of a motion picture would be infringement even though the station retransmitted it from a film (embodying the original live performance) licensed by the motion picture producer; or even though the television station performed the picture by picking up, and rebroadcasting to its audience, a broadcast made by another station which had been licensed to perform the work.

As the Courts below had no difficult in finding, CATV is in the business of selling entertainment to its audiences, just as are motion picture and television theatres; it is

not in the business of selling appliances to individual customers, which they then use individually to improve the reception of their own sets.

POINT II

A copyright owner should not be deprived of valuable rights in his work by an involuntary license, created by "implication."

The Solicitor General has urged the Court to find that CATV's retransmissions of copyrighted works in the normal service area of the originating station are authorized by a "license," to be created by "implication."

We respectfully submit that there is no legal basis for thus creating new and severe exceptions to statutory copyright; a function which could only be performed by Congress. Moreover, there is no logical or equitable justification for thus drastically diminishing the rights of copyright owners to enrich and serve the convenience of an industry which is rapidly expanding and growing wealthy by transmitting copyrighted works to paying audiences.

The Solicitor General contends that a license limited to retransmissions within the normal service area of the originating broadcaster is justified because the advertising which accompanies that broadcast is aimed at the "potential audience" in the area, and that any increase of this audience through CATV retransmission would increase advertising revenues and thus increase copyright fees.

But this is no justification for a "license" which would allow CATV to do, without permission, something which is

basically the right of the copyright owner and which the copyright owner would be denied the power to exercise by the very same "license"—to charge a fee for communicating his work to an audience. Actually CATV derives profits from exploiting a copyrighted work whether the work is embodied in a program originated by a local broadcaster, or one in a distant area. Its charges to its customers do not vary, depending on the "mix" of local and distant retransmission. In either case, its "performances are not eleemosynary." (*Herbert* v. *Shanley Co.*, 242 U.S. 591, 594).

In reality, the effect of the Solicitor General's theory—if not the real premise on which it is based—is that a copyright owner is not entitled to derive income from his work from more than one audience, or more than one source. Carried to its logical extreme, this premise would deny authors, publishers and producers income from many uses of their work—and allow others to reap the benefits, charging the public for viewing or reading the creator's work without compensating him or obtaining his permission. As has been noted in the opinions below, publishers of newspaper, magazines and books derive income from a given work (income which produces the author's compensation) both by selling copies of their publications and by selling advertising which appears in these copies. Certainly no one would argue that because the publisher of a magazine or a paperback book is paid for the advertisements it contains —indeed, may make much of his profit from that advertising—that others may therefore communicate the contents of that work to readers in the same area of distribution, by selling pirated copies.

Yet this is the very principle which underlies the Solicitor General's concept of an implied license. Most commercial

and public broadcasters do not charge the recipients of their programs. However, some do. For example, some forms of "pay television" which broadcast their programs charge their subscribers a fee. There are also non-commercial television and radio stations which receive voluntary payments from their audiences. Since these broadcasters have already been paid once by their audience, it would follow from the Solicitor General's theory that CATV systems would now be entitled to retransmit these programs within the local service area, and incorporate advertising sold by them to business concerns.

One of the basic weaknesses of the implied license theory is its reliance on the assumption that CATV is a limited facility which merely adds a marginal audience to that reached by off-the-air broadcasting. But the CATV industry is rapidly expanding. It is already a major medium of communication. "The industry's optimists are shooting for 45-million or so homes in the next decade" (BUSINESS WEEK, February 19, 1966, p. 104); "CATV may conceivably transform the television industry" (ibid., p. 101); "just as the nation was wired for telephone, it could be wired for television" (E. A. Laport, Director of Communications Engineering, Radio Corporation of America; quoted in THE WALL STREET JOURNAL Jan. 15, 1967. It is also likely that satellite transmitters linked with CATV systems will, in the next few years, expand the normal service area of some television stations to embrace regional areas, or the entire country. These technological developments indicate that questions involving licensing—whether it is warranted, and if so, in what form—are questions which the Congress should decide. If this Court decreed the existence of a "license" today, it might have to

decree amendments to it in a few years, to accommodate to new developments.

Moreover, if the receipt of advertising revenue by the originating television broadcaster justifies an implied license, then, by the same logic, the absence of this revenue would—in the interests of justice—require the implication of exceptions to the implied license:

(i) If a CATV system sold its own advertising for programs retransmitted in the local service area, its subscribers should be entitled to a rebate on the charges they paid on the theory that CATV having been paid once could not legally charge them a second fee for the same broadcast.

(ii) A CATV system should not be entitled to an implied license when it retransmitted the "sustaining" (advertisement-free) programs of a local television station; or when it retransmitted copyrighted programs broadcast by a local education or public television station which carried no advertising. Since the copyright owner has not been paid out of advertising, he would be entitled to a share of the income his work produced for the CATV system.

(iii) A CATV system should not be entitled to an implied license if it retransmitted programs broadcast by a local commercial station but eliminated the station's advertising —or some of it—and filled the gaps with news announcements, weather forecasts, or background music. This would probably make CATV systems even more attractive to their audiences. The subscribers would then be paying a fee for entertainment unadulterated by irritating commercials; but the rationale that the program had been paid for by the advertising would be destroyed and so would the local station's advertising revenue.

It has been argued that the CATV industry must be permitted free use of copyrighted works to prevent prophesied violations of the antitrust laws by copyright owners. But if such dangers actually materialize, effective remedies for them are available under the antitrust laws. And if these remedies are insufficient, Congress can amend the antitrust laws and Federal Communications Act to provide additional remedies. Destroying the right of an author to share in the income his work produces for the CATV industry as an antitrust precaution is neither just nor necessary.

Paradoxically, the CATV industry and others, who urge the destruction of copyright to protect the public interest, do not appear the least concerned by lack of meaningful protection for other facets of the public interest which are affected by CATV.

In the last decade CATV has developed into a major industry and important medium of communication. Large corporations such as the General Electric Company and the International Telephone and Telegraph Company have acquired many CATV systems throughout the country. And the industry is making steady progress down the well-worn path to oligopoly without any significant legislative provisions for the regulation of charges to the public, or for preserving some channels on each system—free from control of private corporations—to serve cultural and educational uses. It is all too apparent that the CATV industry is developing, as did commercial television, for the sole purpose of returning the greatest profit possible to its owners, without any real concern for the public or the public interest.

Under these circumstances, expression of concern for the public interest is hardly an inspiring, equitable, or convincing reason for denying copyright protection to authors

and other creators of works used by CATV. Actually, the "concern" merely rationalizes a policy that would allow the CATV industry free use of property created by others, for its greater profit.

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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